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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

ORIONE CHRISHONE BROWN,

Defendant and Appellant.

C077768

(Super. Ct. No. 13F03759)

In exchange for a negotiated sentence of five years in prison, defendant Orione Chrishone Brown pleaded no contest to voluntary manslaughter (Pen. Code, § 192, subd. (a))¹ and second degree robbery (§ 211); he also admitted a firearm enhancement allegation (§ 12022, subd. (a)(1)). Given the contentions on appeal, it is not necessary to recount the facts of the underlying offenses. It is sufficient to explain that prior to the plea, the trial court indicated that pursuant to the plea agreement, defendant would be sentenced to an aggregate term of five years, consisting of the low term of three years

¹ Undesignated statutory references are to the Penal Code.

on the voluntary manslaughter count, plus one year for the firearm enhancement, plus one year (one-third the midterm) for the robbery count. At sentencing, defendant's counsel asked the trial court to "minimize the fines." The trial court sentenced defendant to three years on the voluntary manslaughter count, one year for the firearm enhancement, and three years (the midterm) on the robbery count, staying two years pending successful completion of the remaining sentence to arrive at an aggregate five-year prison sentence. Regarding fines and fees, the trial court said if defendant "were disabled in some way" the court would consider reducing his fines and fees, "but it appears he is not." The trial court ordered defendant to pay, among other things, a \$382.22 main jail booking fee (Gov. Code, § 29550.2), a \$61.75 main jail classification fee (Gov. Code, § 29550.2), and \$702 for the presentence investigation and report (§ 1203.1b).

Defendant now contends (1) the trial court orally pronounced an incorrect sentence on the subordinate term for robbery because it did not impose one year (one-third the midterm), and (2) the trial court improperly imposed booking, jail classification, and presentence report fees without finding defendant had the ability to pay.

The People agree with defendant's first contention and so do we. We will modify the judgment to sentence defendant to a consecutive one-year term (one-third the midterm) on the robbery conviction. In addition, we will conclude that defendant forfeited his challenge to the fees by failing to object in the trial court. We will affirm the judgment as modified.

DISCUSSION

I

Defendant contends the oral pronouncement of judgment is incorrect and asks us to deem the abstract of judgment and clerk's minutes to reflect the correct sentence. The People agree.

The trial court selected the voluntary manslaughter conviction as the principle term and the robbery conviction as the subordinate term and imposed consecutive terms.

(§ 1170.1) Subject to exceptions not relevant here, when the trial court imposes a consecutive term on the subordinate offense, the sentence for that subordinate term must be one-third the midterm. (§ 1170.1, subd. (a).) Accordingly, here the only authorized sentence on the robbery was a one-year sentence. The trial court was not authorized to impose the full three-year term and stay two years conditioned on defendant's successful completion of his sentence. An unauthorized sentence may be modified at any time whether or not there was an objection in the trial court. (*People v. Smith* (2001) 24 Cal.4th 849, 854.)

The abstract of judgment and minute order correctly reflect the calculation of defendant's sentence. "We realize the general rule is that the oral pronouncements of the court are presumed correct. (*People v. Mesa* (1975) 14 Cal.3d 466, 471.) Nonetheless, under these circumstances, we will deem the minute order and the abstract of judgment to prevail over the reporter's transcript. (*People v. Cleveland* (2004) 32 Cal.4th 704, 768; *People v. Smith* (1983) 33 Cal.3d 596, 599.) When the record is in conflict and cannot be harmonized, ' ". . . that part of the record will prevail, which, because of its origin and nature or otherwise, is entitled to greater credence" ' (*People v. Smith, supra*, at p. 599.) The erroneous statements in the reporter's transcript are of no effect. (*People v. Cleveland, supra*, at p. 768.)" (*People v. Thompson* (2009) 180 Cal.App.4th 974, 978.) The judgment and sentence are correctly recorded in the abstract of judgment. We will modify the judgment to sentence defendant to a consecutive one-year term (one-third the midterm) on the robbery conviction.

II

Defendant next contends the trial court should not have imposed the jail booking fee, classification fee, and presentence report fee because he does not have the ability to pay them. The People argue this issue is forfeited because defendant did not object in the trial court. We agree with the People that this issue is forfeited by defendant's failure to object.

Before a trial court may impose the main jail booking fee, main jail classification fee, or presentence investigation fee the trial court must determine that the defendant has the ability to pay. (§ 1202.5; Gov. Code, § 29550.2.) But the failure to object on the basis of ability to pay forfeits a defendant's claim of factual inability to pay "and the dependent claim challenging 'the adequacy of the record on that point.' [Citations.]" (*People v. McCullough* (2013) 56 Cal.4th 589, 597 (*McCullough*) [Gov. Code, § 29550.2]; see *People v. Trujillo* (2015) 60 Cal.4th 850, 858 (*Trujillo*) [§ 1203.1b].) "[A] defendant who does nothing to put at issue the propriety of imposition of a booking fee [or the presentence investigation fee] forfeits the right to challenge the sufficiency of the evidence to support imposition of [these] booking [fees] on appeal, in the same way that a defendant who goes to trial forfeits his challenge to the propriety of venue by not timely challenging it." (*McCullough*, at p. 598.)

Defendant claims counsel's request that the court minimize his fines should be construed as "a challenge to any fee imposed when the ability to pay was required and did not exist." We disagree. A request to minimize a fine is a request for the court to exercise its discretion. The presentence investigation and report costs are developed by the probation department and approved by the presiding judge of the superior court. The amounts are not discretionary with the trial judge. (§ 1203.1b, subd. (a).) Similarly, the criminal justice administration fees (jail booking and jail classification) are limited to the actual administrative costs incurred by the county. (Gov. Code, § 29550.2, subd. (a).) The amounts are also not discretionary with the trial judge. By contrast, the amount of some fines, such as the restitution fine, is discretionary within statutory limits. (§ 1202.4.) The probation report recommended defendant pay \$3,900 in restitution under section 1202.4. That amount is well over the minimum fine that the trial court could have imposed. (In fact, the trial court significantly reduced the restitution fine, imposing a \$1,000 restitution fine.) The most reasonable interpretation of defense counsel's request to minimize defendant's fines is that it was a request that the trial court exercise its

discretion to reduce the discretionary fines, such as the restitution fine, not as a request that the trial court make a determination of his ability to pay the criminal justice administration or presentence investigation fees.

Here, the probation report recommended defendant pay a \$382.22 main jail booking fee, a \$61.75 main jail classification fee, and \$702 for the presentence investigation and report. Defendant had adequate notice of the fees and that the presentence investigation and report costs would be imposed, but did not object either in writing or orally, and never requested a hearing on his ability to pay. Based on the reasoning of *McCullough* and *Trujillo*, we conclude defendant forfeited his challenge to the cost of the presentence investigation and report imposed pursuant to section 1203.1b, and the main jail booking and classification fees imposed pursuant to Government Code section 29950.2.

DISPOSITION

The judgment is modified to sentence defendant to a consecutive one-year term (one-third the midterm) on the robbery conviction. The judgment is affirmed as modified. The modified sentence is already correctly reflected in the court's minutes and the abstract of judgment, which need not be amended or corrected.

/S/
MAURO, J.

We concur:

/S/
BLEASE, Acting P. J.

/S/
MURRAY, J.